LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 4 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

HENRY HAMMER,
Columbia, S. C.,

HENRY H. EDENS,
Columbia, S. C.,

WILLIAM E. CHANDLER, JR.,
Columbia, S. C.,
Attorneys for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

PAGE

Preliminary Statement 1

Additional Constitutional and Statutory Provisions Involved 2

Argument 2

Contrary to the contention of Respondent, the mode or manner of determining the rights and duties of litigants in suits brought in the Federal courts is governed by the Federal law under the doctrine of Erie R. Co. v. Tompkins, 304 U. S. 64:

(1) Because the question of who shall be the arbiter of the facts involves, not a substantive, but a procedural matter which under our system of Federal jurisprudence does not, and should not, substantially change or affect the outcome of the litigation either for or against any of the parties 5

(2) Because Article III of the United States Constitution vests in Congress the sole power of determining the practice and procedure in the Federal courts and also because of the constitutional limitation of the Seventh Amendment 12

Conclusion 14

CITATIONS

	Page
Adams v. Davison-Paxon Co., 230 S. C. 532, 96 S. E. (2d) 566	3, 6, 9
Ballard v. Southern Cotton Oil Co. (E. D., S. C.), 145 F. Supp. 882	9
Bernhardt v. Polygraphic Co. of America, 350 U. S. 189	10, 11
Bowie v. Sorrell (C. A. 4), 209 F. (2d) 49	12
Cities Service Oil Co. v. Dunlap, 308 U. S. 208	11
Erie R. Co. v. Tompkins, 304 U. S. 64	1, 2, 3, 4, 6, 7, 9, 10, 12, 13
Ettleson v. Metropolitan Life Ins. Co. (C. A. 3), 137 F. (2d) 62	12
Ex Parte New Orleans City Bank, 3 How. 317, 11 L. Ed. 603	13
Galloway v. U. S., 319 U. S. 372	3, 4
Googe v. Speaks, 194 S. C. 206, 9 S. E. (2d) 439	3
Guaranty Trust Co. v. York, 326 U. S. 99	11, 13
Herron v. Southern Pacific Co., 283 U. S. 91	12
Lumberman's Mutual Casualty Co. v. Elbert, 348 U. S. 48	12
McCabe v. Sloan, 184 S. C. 158, 191 S. E. 905	3
McDowell v. Stilley Plywood Co., 210 S. C. 173, 41 S. E. (2d) 872	4
Miles v. West Va. Pulp & Paper Co., 212 S. C. 424, 48 S. E. (2d) 26	5
Palmer v. Hoffman, 318 U. S. 109	3, 11
Peters v. Hobby, 349 U. S. 331	4
Ruhlin v. New York Life Ins. Co., 304 U. S. 202	11
Saunders v. Shaw, 244 U. S. 317	9
Sibbach v. Wilson & Co., 312 U. S. 1	11, 13
Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865	10
Whitehead v. Shattuck, 138 U. S. 146	13

OTHER REFERENCES

Article III, U. S. Constitution	2, 5, 12, 13
5th Amendment, U. S. Constitution	8
7th Amendment, U. S. Constitution	5, 13
28 U. S. C. 723 b (1940 Ed.)	10
28 U. S. C. 2072	2, 13
5 Moore's Federal Practice, Section 38.08 (6)	12

Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Subsequent to the oral argument of this case on January 28, 1958, this Court on March 3, 1958, issued an order restoring the case to the calendar for reargument and asked counsel "to brief and argue the application of *Erie R. Co. v. Tompkins*, 304 U. S. 64, in connection with Question II of the Questions Presented in Respondent's Brief, and Point III of the Points in Petitioner's Reply Brief", pursuant to which this Supplemental Brief is herewith submitted.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III—United States Constitution

"Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *"

28 U. S. C. 2072. Rules of civil procedure for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

ARGUMENT

Contrary to the contention of Respondent, the mode or manner of determining the rights and duties of litigants in suits brought in the Federal courts is governed by the Federal law under the doctrine of Erie R. Co. v. Tompkins, 304 U. S. 64.

Under its discussion of Question II contained at pages 46 and 47 of Respondent's Brief on Merits, respondent states: "While the Seventh Amendment preserves the right to jury trial according to the rules of the common law, it is well established and fundamental that, although questions of fact must be decided by the jury and may not be re-examined by the Court, the question whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court."

Petitioner has no quarrel with the foregoing statement and in fact agrees with it for the reason that whether or not the doctrine of *Erie* applies, this rule is the same in the State courts of South Carolina as it is in the Federal courts; in each jurisdiction the trial judge has the right to determine the sufficiency of the evidence of the party having the burden of proof. *Galloway v. U. S.*, 319 U. S. 372, 389; *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566.

Also, whether or not the burden of proving the affirmative defense of the application of the South Carolina Workmen's Compensation Act as the exclusive remedy is a matter governed by the State law or the Federal law makes no difference, for the rule in both jurisdictions is the same. However, it may be noted that according to the decision of this Court in *Palmer v. Hoffman*, 318 U. S. 109, the question of which party has the burden of proof is a substantial right which may materially affect the outcome of the litigation. Thus, in accordance with the *Erie* doctrine the State law governs this question. In South Carolina it is firmly established that "when one pleads an affirmative defense, the burden is on him to prove it." *McCabe v. Sloan*, 184 S. C. 158, 191 S. E. 905. And in *Googe v. Speaks*, 194 S. C. 206, 9 S. E. (2d) 439, the South Carolina Supreme Court held that the defense of the application of the Workmen's Compensation Act to a common law action for tort is required to be affirmatively plead. Such defense, just as the affirmative defense of contributory negligence, if proved by the preponderance of the evidence, establishes a want of a cause of action in the plaintiff.

And regardless of the application of the doctrine of *Erie R. Co. v. Tompkins* to the question of what standard should be applied by the trial judge in testing the legal sufficiency of the evidence of the party having the burden

of proof, the rule is the same in the State and Federal Courts. As pointed out in petitioner's original brief at page 19, both this Court, *Galloway v. U. S.*, 319 U. S. 372, 379, 380 and the South Carolina Supreme Court, *McDowell v. Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. (2d) 872, 874, 875, in testing the legal sufficiency of the evidence of a party having the burden of proof, apply the standard of viewing the testimony of a witness as a whole and when so viewed refuse to give probative value to the testimony produced by a litigant in support of his burden where such testimony is subsequently changed, corrected or repudiated by the witness on the stand prior to the completion of his examination—a standard which has for its basis the promotion of the orderly administration of justice to discourage the giving of false testimony.

Applying the foregoing rules and standard to the facts in this case, and the principle flowing from the application of this standard that "mere speculation may not be allowed to do duty for probative facts", it is clear that respondent's evidence created no factual issue upon which a finding could properly have been made in favor of the affirmative defense. Petitioner therefore submits that following the traditional practice of refusing to decide constitutional questions when the record discloses other grounds of decision, *Peters v. Hobby*, 349 U. S. 331, 338, this Court could, and should, reverse the Court below and reinstate the judgment of the District Court on the ground that the District Court properly dismissed respondent's affirmative defense.

Assuming, *arguendo*, that the evidence presented by respondent created a factual issue, petitioner submits that the question of whether the Court or the jury shall be the arbiter of the facts is governed not by the State procedure and practice but by the Federal law under the decision of *Erie R. Co. v. Tompkins*, for two reasons, as follows:

1. Because the question of who shall be the arbiter of the facts involves, not a substantive, but a procedural matter which under our system of Federal jurisprudence does not, and should not, substantially change or affect the outcome of the litigation either for or against any of the parties.

2. Because Article III of the United States Constitution vests in Congress the sole power of determining the practice and procedure in the Federal courts and also because of the constitutional limitation of the Seventh Amendment.

We shall treat each of the reasons separately below.

1. The question of who shall be arbiter of the facts involves, not a substantive, but a procedural matter which under our system of Federal jurisprudence does not, and should not, substantially change or affect the outcome of the litigation either for or against any of the parties.

Admittedly, if the issue of whether respondent was in the business of constructing substations were litigated in a workman's compensation proceeding in South Carolina, under the controlling State practice and procedure, it would have been the province of the State Industrial Commission to resolve the conflicts in the evidence and to determine the fact of whether the work of the independent contractor, Bouligny Construction Company, in erecting substations to be delivered to respondent upon completion was respondent's business. The finding of the Industrial Commission would be reviewable, however, by two appellate tribunals, to-wit, first, the Circuit Judge sitting as an appellate court and second, the South Carolina Supreme Court, to determine whether such finding is "in accord with the preponderance of the evidence", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 27; whereas, if this issue were litigated in a common law action for tort in a State court of South Carolina, it would have been the pro-

vince of the trial judge, rather than the jury, to resolve the conflicts in the evidence and to determine the fact of whether the work of Bouligny in constructing substations to be delivered to respondent upon completion was respondent's business, reviewable, however, only by the South Carolina Supreme Court to determine whether the finding of the trial judge is "in accord with the preponderance of the evidence", *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566, 571.

Respondent, in its brief, contends that the State practice governs in determining the mode or manner in which the issue involved herein should be tried and reviewed. And, in the case *sub judice*, if this contention is followed to its logical conclusion, both the Court of Appeals and this Court would not be confined to an examination of the record merely to determine whether there was sufficient evidence to create a factual issue but would be empowerd also to examine the evidence to determine whether the finding of the trier of facts, based upon the credibility of the witnesses and the weight of the testimony offered by the party having the burden of proof, is "in accord with the preponderance of evidence". And under its contention respondent would be required to demonstrate not only that its evidence was legally sufficient but also that it sustained respondent's burden of proof of the affirmative defense by the "preponderance of the evidence."

Although it is respectfully submitted that the dismissal of the affirmative defense by the trial judge should be sustained either under the limited scope of appellate review for the reason that the evidence presented in support of the affirmative defense was legally insufficient, or under the unlimited scope of review for the reason that the respondent's evidence did not preponderate in favor of its affirmative defense, petitioner, however, must disagree with respond-

ent's basic contention that the mode of trial and scope of appellate review in the State courts govern in this case. Such contention is contrary to *Erie R. Co. v. Tompkins*, 304 U. S. 64, because the mode of trial and the scope of appellate review are clearly procedural matters which under the *Erie* doctrine must be governed by the Federal practice and procedure. Of course, the principles, tests and reasoning of the South Carolina decisions applicable in determining whether one is engaged in a particular business or whether Section 72-111 of the Act was intended to apply to particular circumstances are substantive matters which, under the *Erie* doctrine, govern and should be applied to the facts in this case in determining the issues of (1) whether Section 72-111 was intended to apply to circumstances wherein the injured workman's immediate employer is required by law, as distinguished from a voluntary election on his part, to provide workmen's compensation coverage for his employees and (2) whether the work of Bouligny Construction Company in constructing the substations to be turned over to respondent upon completion was respondent's business.

In passing, it should be noted that prior to the commencement of trial it was petitioner's position, first, that the affirmative defense should be dismissed on purely legal grounds (R. 2, page 7, Respondent's Brief), which presented a question of law as to whether Section 72-111 was intended to apply; and second, that if it was intended to apply the only issue of fact for a jury to determine would be whether the work of Bouligny in constructing substations to be delivered to and used by the respondent upon completion, was respondent's business.

And it is also worthy of note that at the trial the only questions of law submitted by the parties to the trial judge were: (1) upon petitioner's motion prior to his case in re-

ply, whether the evidence presented by respondent had probative value to create a factual issue upon which reasonably minded men could base a finding in favor of respondent's affirmative defense, and (2) upon respondent's motion made after the affirmative defense had been stricken, whether the only reasonable conclusion deducible from the evidence was that the work of Bouligny Construction Company in constructing substations to be turned over to and used by respondent upon completion, was respondent Blue Ridge's business (R. 52, 54). In sustaining petitioner's motion for a dismissal of the affirmative defense made after respondent's case and before petitioner's case in reply, the District Judge did not weigh the evidence, but merely confined himself to a consideration of the legal sufficiency of the evidence and very properly stated, "I don't know of any issues of fact to submit to the jury" (R. 49, 51). And in view of this ruling, the District Judge, of course, had no alternative but to deny respondent's motion for a directed verdict. As a matter of fact, in both the District Court and the Court of Appeals, neither party contended that the issue of fact, to wit, whether the work of Bouligny in constructing substations to be delivered to respondent upon completion was respondent's business, should be submitted as a matter of law to the District Judge as the trier of the facts; and, in dismissing the affirmative defense, the District Judge did not serve as the trier of facts. On the contrary, both litigants contended that no issue of fact was presented, but each for a different reason as pointed out above.

It is petitioner's position, as demonstrated in his original brief, that the respondent's evidence was insufficient to present an issue of fact which could reasonably be resolved in favor of respondent's affirmative defense; but if respondent's evidence could be judged legally sufficient to create a factual issue, petitioner submits (1) that reasonably minded

men may draw different conclusions therefrom, (2) that whether the evidence was subject to conflicting conclusions or to but a single conclusion in favor of respondent, the petitioner is entitled under the "due process" clause of the Fifth Amendment to have his day in court to present controverting evidence, *Saunders v. Shaw*, 244 U. S. 317, and (3) that the conflicts in the evidence and the conclusions therefrom should be ultimately determined by a jury in accordance with the Federal practice and procedure.

And apart from the foregoing, petitioner also takes the position that the affirmative defense as alleged in the answer did not constitute a legal defense to petitioner's cause of action. In its answer, respondent alleged that the petitioner's employer, Bouligny, was required to and did provide coverage for its employees, including petitioner, as distinguished from a voluntary election on the part of Bouligny to operate under the Act. Under such circumstances, in accordance with the decision of *Ballard v. Southern Cotton Oil Co.* (E. D., S. C.), 145 F. Supp. 882, and the reasoning of the South Carolina Supreme Court in *Adams v. Davison-Paxon Co., supra*, that Section 72-111 was intended not for the protection of employees under such circumstances but for the protection of employees not otherwise protected by law, it is clear that this section never became operative in the instant case, and respondent, therefore, should not now be permitted to claim the immunities thereof to relieve itself of its common law liability for negligence.

Adverting now to petitioner's first reason in support of his contention that the State law cannot govern the mode or manner of trial in the case at bar, he submits that the question of whether the court or jury shall be the trier of facts relates to a procedural matter, the determination of which is not controlled by the doctrine of the *Erie case* that

the Federal courts are bound to follow the substantive law of the State in which it sits.

In overruling *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865, this Court in *Erie R. Co. v. Tompkins* abridged the freedom of the Federal courts to exercise independent judgment in matters of general jurisprudence. It ruled that Federal courts, in diversity cases, must look to State law to determine the substantive rights of the litigants. In the same year the Federal Rules of Civil Procedure authorized by the Enabling Act of 1934, 28 U. S. C. (1940 Ed.), 723 b, made it clear that the Federal courts are not bound by State practice and procedure. However, both the Federal Rules and the *Erie case* excepted from Federal power matters dealing with "substantive" rights.

Although both the Federal Rules and the *Erie case* made it clear that matters relating to procedure shall be governed by Federal law, the determination of the difference between "procedural" and "substantive" law presented some difficulty. As stated by Mr. Justice Reed in the concurring opinion of the *Erie case* at page 92, "the line between procedural and substantive law is hazy but no one doubts federal power over procedure."

The problem presented here by the conflicting contentions of the parties is whether the question of determining between trial by jury or trial by court involves a procedural matter governed by the Federal practice and procedure or a substantive right governed by the rules and decisions of the State court.

The mode of approaching the problem is clearly pointed out by Mr. Justice Douglas in *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 199. The decisions of this Court teach that the crucial question in arriving at what is "substantive" and what is "procedural" is whether the application of the State rule in the Federal court would

substantially change the outcome of the case, and if it would then the matter is one of "substantive" right, otherwise it is a matter of "procedure". This approach to the problem has been applied by this Court in matters relating to equitable rights, *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202; to arbitration provisions in a contract, *Bernhardt v. Polygraphic Co.*, 350 U. S. 199; to right of a physical and mental examination of parties under Rule 35 of the Federal rules, *Sibbach v. Wilson & Co.*, 312 U. S. 1; to burden of proof, *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208; to conflicts of law rules, *Palmer v. Hoffman*, 318 U. S. 109; and to limitation of actions, *Guaranty Trust Co. v. York*, 326 U. S. 99.

Thus, following the course chartered by this Court and applying its guiding principles to the facts in this case, the petitioner submits that the solution to the problem here should present little, if any, difficulty.

Surely, under our Federal system of jurisprudence it cannot be contended that the outcome of litigation in the Federal courts would be substantially changed merely because a case is tried by the court rather than by jury. The litigants in the Federal courts are surrounded by the same safeguards, whether the issues be tried by court or jury. The differences, if any, between trial by court or trial by jury are merely incidental and insignificant, and would not, and should not, affect the outcome of litigation. This case is unlike *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 199, where this Court concluded that the differences between judicial determination and arbitration were so great that the outcome of litigation would be substantially affected by compelling disputes to be settled by arbitration rather than by judicial determination. In discussing the differences between arbitration and judicial determination, Mr. Justice Douglas pointed out that arbitrators do not have the benefit of judicial instruction on the law; they need

not give their reasons for the result; the record of the proceedings is not complete; and judicial review is limited—differences which do not exist between trial by jury and trial by court in the Federal courts.

Trial either by court or by jury is nothing more than the mode or manner of determining the substantive rights and duties of the parties, and for the sake of uniformity of procedure and practice in the Federal courts which the Rules were designed to accomplish where, as here, no substantial rights of the litigants are affected, petitioner submits that the Federal practice should govern. *Erie v. Tompkins, supra; Herron v. Southern Pacific Co.*, 283 U. S. 91; *Ettleson v. Metropolitan Life Ins. Co.* (C. A. 3), 137 F. (2d) 62; *Bowie v. Sorrell* (C. A. 4), 209 F. (2d) 49; 5 Moore's Federal Practice, Section 38.08 (6); See *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U. S. 48, 52, where this Court recognized the "differing standards of review on appeal of a jury verdict in the Louisiana and Federal courts" which were apparently treated as matters of procedure rather than substance.

For the foregoing reasons, apart from the reasons which shall be treated under the next heading, it is respectfully submitted that the State law cannot govern the mode or manner of trial in the Federal courts.

2. Because Article III of the United States Constitution vests in Congress the sole power of determining the practice and procedure in the Federal Courts and also because of the constitutional limitation of the Seventh Amendment.

It has been amply demonstrated that the mode of trial in the Federal courts is a procedural matter which under the *Erie* doctrine and the Federal Rules is governed by the Federal and not the State rules of practice and procedure. And if any doubt exists as to whether the State or Federal law should be applied in determining the mode of trial in

a Federal district court, petitioner submits that such doubt vanishes upon consideration of the provisions of Article III and the Seventh Amendment of the United States Constitution.

Under Article III of the Constitution, "Congress possesses the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States". Ex Parte New Orleans City Bank, 3 How. 317, 11 L. Ed. 603. Congress has exercised this power by giving Federal courts, particularly the U. S. Supreme Court, broad rule making powers for practice and procedure, 28 U. S. C. 2072, *Sibbach v. Wilson & Co.*, 312 U. S. 1. And under the Seventh Amendment the right to trial by jury is preserved.

The *Erie case*, at page 78, clearly excepts from the rule requiring Federal courts to follow State court decisions those "matters governed by the Federal Constitution or by Acts of Congress". And in *Guaranty Trust Co. v. New York*, 326 U. S. 99, 105, 106, Mr. Justice Frankfurter made it clear that the substantive rights of litigants as declared by state law when enforced in the Federal courts are always subject to restrictions, *inter alia*, the constitutional right to trial by jury, citing *Whitehead v. Shattuck*, 138 U. S. 146. Mr. Justice Frankfurter clearly expressed the applicable principle when he stated, "State law cannot define the remedies which a federal court must give simply because a federal court in a diversity jurisdiction case is available as an alternative tribunal to the State courts."

It is thus clear from the foregoing authorities that the mode or manner of trial is not only a procedural matter governed by the Federal law, but also pertains to "matters governed by the Federal Constitution or Acts of Congress" which can not be changed or invaded by State law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the original and reply briefs of petitioner, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court should be affirmed and reinstated.

Respectfully submitted,

HENRY HAMMER,
HENRY H. EDENS,
WILLIAM E. CHANDLER, JR.,
Counsel for Petitioner.